widely varying rules as to the judge's power of exclusion. Statutes in several states provide that cumulative evidence may be rejected when the issue to which it relates has been settled beyond a reasonable doubt.[3] Such a rule is obviously undesirable in that it compels the judge to pass upon questions of fact before they go to the jury. In some jurisdictions, cumulative evidence may be rejected upon collateral issues, but not upon the main issue.[4] This distinction is clearly unsound, since the reason for rejecting such evidence is that its evil effects outweigh its probative value. In others, the court is denied all power of exclusion except when the fact sought to be established is not controverted.[5] A recent Massachusetts case supports this view, holding that evidence should not be excluded on the ground that testimony already introduced, if believed, amounts to proof. *Perkins* v. *Rice*, 72 N. E. Rep. 323. This rule ignores the fact that the probative value of evidence, merely cumulative in its nature, may be far outweighed by its disadvantages in expense, delay, and confusion to the minds of the jury. The rule which undoubtedly meets with the greatest favor gives the trial judge a discretionary power of exclusion subject to review by the upper court.[6] Upon principle, too, this seems to present the most satisfactory method of procedure, for it tends to keep down the expenses of litigation, prevents the accumulation of a confused mass of evidence from which it is difficult to sift the truth, and secures to the parties a mode of redress in case of possible error.

THE VICE-PRINCIPAL DOCTRINE. — Whatever may be the basis of the fellow-servant doctrine, — whether that doctrine is an application of the general rule that one man is not liable for the torts of another, or is an exception to the principle of *respondeat superior*, — the courts in applying it almost universally rest their decisions upon the theory of assumption of risk. Among the risks which a servant takes upon himself as incident to the employment is that of injury from the negligence of fellow-servants; but risks arising from the negligence of the master he does not assume.[1] As to how far he assumes the risk arising from the negligence of one standing in the master's place, there is a conflict of opinion. By the "superior servant" doctrine, formulated in Ohio,[2] an employee assumes no risk of injury from the negligence of any servant who has control over him. Accordingly the master is liable for injury to a servant resulting from the negligence of the superior servant in doing any act or giving any order within the scope of his authority even though it pertain to some detail in the operation of the business.

Although the courts of several states[3] and the United States Supreme Court[4] approved this view, New York adopted as the true test of the master's liability, not the rank of the negligent servant, but the character of the negligent act.[5] The master owes to the servant certain duties which he dele-

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[3] Cal. Code Civ. Pro. ¶ 2044.
[4] Fisher *v.* Conway, 21 Kan. 18, 24.
[5] Abenheim *v.* Samuels, 5 N. Y. Supp. 117.
[6] Hupp *v.* Baring, 8 Oh. C. Ct. 259; State *v.* Whitton, 68 Mo. 91.

[1] Farwell *v.* Boston & Worcester R. R., 4 Met. (Mass.) 49. In England and several of our states employers' liability has been largely extended by statute.
[2] Little Miami R. Co. *v.* Stevens, 20 Oh. 415.
[3] Walker *v.* Gillett, 59 Kan. 214.
[4] Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377.
[5] Crispin *v.* Babbitt, 81 N. Y. 516.

gates at his peril. Any servant, of whatever rank, entrusted with the performance of these duties is a vice-principal, and no servant is a vice-principal simply on account of his rank. The master is therefore not liable for the negligent act of a servant in matters of detail in conducting the business. For example, it is a master's duty to supply safe appliances, but under some conditions it is part of the servants' work to construct the appliance from materials supplied by the master. In such a case his liability ends when he supplies sound materials. Thus the construction of temporary scaffolding, to be shifted as the erection of the building progresses, has been held a part of the servants' work.[6] Therefore a master is not liable for injury resulting from negligent construction, even though the injured servant was doing a different class of work from that of the delinquent servant. *Hempstock* v. *Lackawanna Iron and Steel Co.*, 90 N. Y. Supp. 663.

The New York theory is at present accepted by the United States Supreme Court[7] and by the great weight of authority.[8] Some courts, however, apply it with a limitation closely akin to the "superior servant" doctrine. They hold that a general manager or head of a department, to whom the master has delegated all his functions, is a vice-principal by virtue merely of his official position.[9] This exception seems on principle to be unwarranted. No reason appears why official position, if made the test under these particular circumstances, should not be extended to the case of every superior servant. This exception should stand on the same footing with the "superior servant" doctrine, which is far less satisfactory than the theory which makes the character of the negligent act the test. There would seem to be no reason for contending that a servant did not assume the risk of a negligent act solely because it was done by his superior. On the other hand, if the act was done in the performance of a duty not delegable by the master, the injured servant did not assume the risk of injury from such an act, whether done by a servant superior or inferior in rank to himself.

ABANDONMENT AND SUBROGATION IN MARINE INSURANCE. — When a ship is injured by a wrongdoer, if the insurer accepts an abandonment of it and pays as if there had been a total loss, he is given a claim upon the right of action which the insured has against the wrongdoer. This claim has been explained in two ways. The leading English case,[1] although its decision is consistent with either theory, supports the view that the abandonment carries with it the money claim against the tort-feasor as an equivalent of the *spes recuperandi*. There are American opinions to the same effect.[2] On the other hand, it has been suggested that the insurer's claim rests upon the principle that in all contracts of indemnity anything coming into the hands of the insured, which reduces the loss, becomes subject to an equity in favor of an indemnifier who has already paid.[3] Usually either theory would permit the same decision, but in a recent case a choice

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[6] Beesley *v.* Wheeler & Co., 103 Mich. 196.
[7] Baltimore & O. R. Co. *v.* Baugh, 149 U. S. 368.
[8] Fox *v.* Spring Lake Iron Co., 89 Mich. 387.
[9] Quincy, etc., Co. *v.* Kitts, 42 Mich. 34.

[1] North of Eng., etc., Ass'n *v.* Armstrong, L. R. 5 Q. B. 244.
[2] Comegys *v.* Vase, 1 Pet. (U. S.) 193.
[3] Burnard *v.* Rodocanachi, 7 App. Cas. 333, *per* Lord Blackburn.